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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 228.

NYE & NISSEN (A Corporation), and ABRAHAM MONCHARSH,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

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This Reply Brief is filed pursuant to leave granted at the oral argument, March 3, 1949.

I. COMMENT ON STATEMENT.

Although the Government Statement charges that there came into existence in 1938 on the part of the defendants an "elaborate scheme to defraud the Government" (U. S.

Br. 39) ". . . by all available deceptive practices . . . by every type of deceit that ingenuity could devise" (U. S. Br. 42), the record discloses that the Army and Navy continued to buy in increasing quantities from Nye & Nissen throughout all the years covered by the indictment. For example, in April and May 1944, the Army was buying 1800 cases of eggs a week from Nye & Nissen without complaint (R. 609). And in 1944 the armed services, as distinguished from the War Shipping Administration purchased 2,770,650 dozen of eggs, 242,760 lbs. of butter and 2,554 lbs. of cheese (R. 4267-4268),[1] all of which merchandise conformed with specifications of the purchase orders. Moreover, the sales to the armed services for 1943 were "a little larger than the ones mentioned for 1944" (R. 4270), and were made to the complete satisfaction of the purchasing agencies. But the singular fact which is not mentioned in the Government's Statement is that when the entire 4600 pages of record is reviewed, the "proof" of the actual receipt by the armed services of alleged sub-quality merchandise is found in the testimony of Colonel Hand that in 1941 he discovered three bad eggs in a frying pan and five bad eggs in a pastry cook's bowl at the Presidio several days after delivery, and following two separate official inspections of the merchandise before acceptance by the Army.[2]

Hand's testimony on this subject was admitted over objection and was clearly inadmissible since it permitted the jury to draw the inference of a prior condition of inferior-

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[1] These branches of the armed services were the U. S. Marine Hospital, Quartermaster Ft. McDowell, Sales Commissary, Quartermaster Presidio of California, Presido of Monterey, the Navy Market Office and the Quartermaster Market Center.

[2] These eggs were grade B or Trade eggs, the lowest quality fit for human consumption, which the Army was exclusively buying at this time and which quality egg they specified in their purchase orders (R. 758-759, 763). Under applicable Government standards a case of grade B eggs could properly contain 20% of grade C eggs, Checks and Light Dirties (R. 247), all of which were subject to even more rapid deterioration than the low quality B egg.

ity of the eggs, the further inference that the said condition was known to the defendants, and the further inference that the defendants wilfully and fraudulently shipped the eggs in such condition.

Furthermore, there was no evidence of the sale of even *one pound* of sub-quality or short weight butter to any of the three Government agencies designated in the indictment, and with respect to cheese, merely the showing of a shortage of approximately 130 lbs., the value of which would be less than $50. Actually, the entire evidence of deliveries of sub-quality merchandise is limited to the specific deliveries made to steamship companies principally in April and May 1944, practically all of which were made by one truck driver, Nystrom, who collaborated with Government investigators. It was Nystrom who had stated that he was "in the clutches of the F. B. I." (R. 3589). Upon his leaving the employ of the company in the middle of May 1944, the company suddenly ceased to deliver alleged inferior merchandise, a rather remarkable fact which cannot be over-emphasized.

Thus, the alleged elaborate scheme to defraud is predicated upon the foregoing questionable evidence. Common sense would dictate that the charged plot to defraud could not have continued successfully for seven long years during which time millions of eggs and hundreds of thousands of pounds of butter were purchased by the three designated Government agencies without its early discovery and immediate elimination. In this connection we are constrained to refer to the fact that the post delivery examination of the completed shipments of eggs to the steamship companies were made by two officers of the Army Veterinary Corps who admittedly could not testify as to what condition the eggs might have been in on the days preceding their examination (R. 2839-2841). Obviously the defendants were precluded from meeting and contradicting this opinion evidence since the examinations were all conducted without their presence, without their knowledge, and the

matter kept secret until the time of the delivery.[3] In addition to the question inherent in the admission of this testimony some idea of the subjective and varying character of such opinion evidence may be gained from the following undisputed facts: Smith, whose testimony went unchallenged by the Government, testified that "Every person inspecting a case of eggs will arrive at a different percentage. No two persons will give you the same grade of a case of eggs" (R. 4257). Whitmore, a defense witness recited an instance where in connection with the inspection of an Army order of eggs, four qualified experts examining the same order arrived at four different opinions as to the grade and quality of the order (R. 4200-4202).

A significant fact not covered in the Government Statement is this: that all sales of eggs to the Army were subjected not to one but rather to two separate inspections of the same type and character. The first or preliminary inspection was conducted at the plant of the company, and the second inspection at the point of delivery. Final acceptance of the order was determined at the point of delivery (R. 4231, 4337). The prosecution's theory of fraud was that all planned deceptions were practiced upon the official inspectors at the preliminary inspection at the company plant. This theory, of course, ignores the fact that the eggs were subjected to exactly the same type of inspection at the point of delivery. Thus, artifices and tricks employed for avoiding a proper inspection at the plant could be of little practical use unless it were followed by deception upon the inspectors at the point of delivery where incidentally the official inspectors drew whatever cases they

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[3] It should be noted that all of the questioned shipments of eggs although known to be allegedly inferior to the quality specified in the purchase orders were put aboard the vessels and were used throughout the voyages. The steamship companies registered no complaints and although having knowledge that the shipments were presumably inferior, made payments to Nye & Nissen in the amounts specified in the purchase orders and invoices accompanying the deliveries.

desired from the lot and re-examined the eggs for the purpose of arriving again at an opinion as to the grade and quality of the entire order.

The undisputed evidence is that long before the creation of the War Shipping Administration the company had a long and mutually satisfactory relationship, as a supplier, with the private steamship lines such as the American President Lines, the Matson Navigation Co., the Moore McCormick Steamship Co., and others. There is an inference, however, in the Statement of the Government that such relationship did not begin until after December 1943 (U. S. Br. 7). Such implication, of course, is not in accordance with the facts. In connection with that phase of the case relating to transactions with these steamship companies although mindful of the rule that upon review after conviction the evidence must be viewed in the aspect most favorable to the prosecution, there is still a requirement that the theory of the prosecution must not run counter to common sense. Yet, to support the theory of the prosecution in this phase of the case it would be necessary to assume that the jury concluded that as long as the steamship companies remained in private hands their purchase orders were strictly complied with. But as soon as the steamship companies became agents of the United States Government thereby invoking criminal sanctions in connection with any frauds perpetrated upon them, the defendants and Nye & Nissen thereupon changed their former policy of honest dealing and wilfully conspired to ship inferior merchandise, thereby subjecting all of them to criminal prosecution. This thought challenges the very substance of the charged conspiracy. For in any conspiracy trial the jury must find beyond a reasonable doubt the elements of which the alleged unlawful agreement consisted. Thus, in this case, can it be said that the jury inferred from evidence of alleged frauds tending to defeat the lawful function of the official inspection system of the Government that an unlawful agreement was established

to defraud any and all Government agencies in existence in 1938 or which might come into existence thereafter? No such absurd conclusion can be rested upon the evidence introduced by the Government in this case.

It is true that the conspiracy when first established in 1938 might have been one to defraud the inspection system of the Army and Navy alone and that in 1942 when the old and established customers of the company—the steamship companies—became agents of the Government the agreement was amended so as to include them within the plan to impede their inspection system. However, there is a factual impediment to such a contention in that no official inspection was required for sales of eggs to the steamship companies until, January 15, 1944 (R. 3555-3556). While the Court of Appeals felt it "questionable" in not holding that the defendants could not have conspired in 1938 to defraud the War Shipping Administration (R. 4606), we believe that it is self-evident that no such anticipatory agreement could have been reached unless by occult powers of divination. If resort is thereby forced to the theory of an amended conspiratorial agreement it is basic that there must be substantial evidence connecting Moncharsh with the amendment. The record, however, does not support by evidence any such theory.

While the fact has been emphasized in the Government Statement that Moncharsh was not alone an officer of the corporation, but the owner of one-third of the stock in it, little significance can be attached thereto for the Court may judicially note that during most of the years covered by the indictment net profits of the corporation was limited by the Excess Profits Tax of approximately 80%. Moreover, the fact that the bookkeeper, Trini Robles, worked in the same large office where Moncharsh and nine other persons were employed is not even a suspicious circumstance. For the preparation of the invoices *per se* is meaningless without proof of prior knowledge of the inferiority of the merchandise specified therein.

The Government omits to state that Moncharsh had nothing whatever to do with sales to the shipping lines (R. 4073), that he "never even saw purchase orders" placed by the steamship companies (R. 4059, 4233). The undisputed testimony in the record is that this phase of the business was exclusively under the jurisdiction of Smith, the vice-president (R. 4228, 4231-4233) and that all orders were filled under the supervision of either Berman or Goddard. Miss Robles' testimony (R. 3156-3177) clearly demonstrates that all contact with steamship company orders was with Berman and Goddard exclusively.

II. THERE IS NO EVIDENCE TO SUPPORT THE CONVICTION OF MONCHARSH FOR AIDING AND ABETTING COMMISSION OF THE SUBSTANTIVE OFFENSES.

In essence the argument of the Government (U. S. Br. 32-52) is that the circumstantial evidence from which an inference of participation in a conspiracy to defeat the lawful function of the official inspection system of the Government during the years 1938 to 1942 is sufficient evidence for the jury to hold Moncharsh as an aider and abettor of the substantive offenses committed in 1944. Throughout its argument, the Government consistently states that in order to apply such a theory the substantive offenses must be committed in furtherance of the conspiracy. But significantly the Government fails to show in this case that the jury made such a finding. Whether the affirmance by the Circuit Court of Appeals is rested upon the substantive principle of the *Pinkerton* case or as the Government seemingly argues, upon an unorthodox theory of aiding and abetting the substantive offenses here involved would have to be found to have been committed in furtherance of the charged conspiracy as a matter of fact. There is no doubt that such a finding is not within the province of the trial court or the reviewing courts since it is not a conclusion of law. The concept of aiding and abetting advanced by the

Government to justify the conviction of Moncharsh on the substantive counts apart from its uniqueness is distinctly at variance with the view expressed on this subject recently by this Court in *Bozza* v. *United States*, 330 U. S. 160.

There Bozza was sought to be held as an aider and abettor in the commission of offenses in violation of several sections of the Internal Revenue Code relating to the unlawful conduct of a distilling business. This Court pointed out that in the matter of the criminal statutes relating to violations of the Internal Revenue Code, such statutes "have broken down the various steps and phases of a continuous illicit distilling business and made each of them a separate offense. Thus, these statutes have clearly carved out the conduct of making mash as a separate offense, thereby distinguishing it from the other offenses involving other steps and phases of the distilling business. Consequently, testimony to prove this separate offense of making mash must *point directly to conduct within the narrow margins which the statute alone defines.* One who neither engaged in the conduct specifically prohibited nor aids and abets it does not violate the section which prohibits it" (330 U. S. 160, 163).

Accordingly, this Court reversed a conviction of Bozza under a count charging him with making or helping to make mash since there was no evidence that "the petitioner ever took part in, or aided and abetted this particular part of the unlawful process in any manner . . ." (id. at 163). Moreover the Court reversed the conviction of Bozza under a count charging him with aiding and abetting the custody and possession of the alcohol on the ground that "there was no testimony that the petitioner ever exercised or aided the exercise of, any control over the distillery . . . Nor was there any testimony that the petitioner acted in any other capacity calculated to facilitate the custody or possession . . ." (id. at 163, 164).

Applying the reasoning of this Court as found in the *Bozza* case to the facts involved here, it is obvious that in

order to prove aiding and abetting on the part of Moncharsh on the separate and distinct crimes of knowingly filing false vouchers with an agency of the Government in the manner described by the statute and with the intent described by the statute (18 U. S. C. [1946 ed.] 80) which is a separate and distinct offense from that of a conspiracy to defraud the United States, the evidence "must point directly to conduct within the narrow margins which the statute alone defines." One will look in vain for such evidence in this record.

A further noteworthy element of the *Bozza* case is found in the charge of the trial court on the subject of aiding and abetting which is set forth in the dissenting opinion (330 U. S. 160, 168, note 3). Since this instruction is nowhere criticized in the opinion of the Court, it is assumed that it correctly states a proper theory of aiding and abetting and the type of evidence required for its proof. That charge reads as follows:

> ". . . Aiding and abetting is something more than merely committing an act which may have the effect of assisting or furthering a criminal transaction. Before a defendant can be held as an aider and abettor, the Government must prove beyond a reasonable doubt that he committed an act which furthered or assisted the criminal transaction, and *at the time he committed the act he knew that a crime was in process of commission*, and *with that knowledge he acted with intent to aid and abet in the criminal transaction . . .*" (Emphasis supplied)

Applying the test of the *Bozza* case to the case at bar requires that there be substantial evidence that Moncharsh acted in a capacity of an aider or abettor with reference to the substantive crimes. To repeat, the record discloses that there is no such evidence. The Government itself recognizes the total lack of such evidence but seeks to overcome the void by advancing a theory of aiding and abetting so singular that no authorities are cited to support it.

To merge the aiding and abetting theory with the conspiracy statute, which the Government obviously proposes, would carry the already elastic doctrine of conspiracy beyond the breaking point.

III. THE ADMISSION OF COLLATERAL OFFENSES AGAINST MONCHARSH WHICH HE DID NOT COMMIT FOR THE PURPOSE OF PROVING HIS INTENT WITH REFERENCE TO THE SUBSTANTIVE CRIMES, WHICH HE DID NOT COMMIT WAS CLEAR ERROR.

The Government's argument on this point (U. S. Br. 57-60) stands or falls on the strength of its argument that Moncharsh aided and abetted the commission of the substantive offenses. We feel that the Government's position is so definitely untenable on the former point that counter argument on the latter point needs no further elaboration.

IV. THERE WAS A CLEAR VARIANCE BETWEEN THE ALLEGATION AND THE PROOF IN RESPECT OF THE CONSPIRACY COUNT.

The Government seeks to deny that the gist of the charged conspiracy was the defeating and impairment of the official inspection system with reference to the purchase of eggs, butter and cheese by the three designated Government agencies from Nye & Nissen. In so doing they are specifically contradicting the theory of the prosecutor which the record so clearly discloses. When challenged upon the theory of his case in the trial court, the prosecutor made clear that the conspiracy count definitely charged the defendants with that type of conspiracy to which we have referred in our main brief. Thus, he stated (R. 390-391):

> "I would like to direct the Court's attention in the first place to the statute. It provides that if two or more persons conspire to commit an offense against the United States or to defraud the United States they shall be guilty if an overt act is committed. Now,

there is a vast difference between a conspiracy to commit an offense against the United States and a conspiracy to defraud the United States. In the case of a conspiracy to commit an offense the specific offense must be proven. But the charge here is a conspiracy to defraud the United States, the particular specifications of the manner in which the fraud was conspired to be committed is set out in three specifications, A, B and C. It will be noted by reading those clauses that the charge against these defendants is not to commit an offense against the United States, but to defraud the United States in the manner alleged, namely, in connection with the grading, weighing, packing, selling and delivering eggs and products to the United States, War Shipping Administration, inferior products, through frauds and deceptions practiced upon the inspectors, graders, and representatives of the United States Department of Agriculture, and so forth. Further, by impeding, impairing, obstructing and defeating the lawful intentions of the United States Department of Agriculture, the War Department and the Navy Department in connection with inspecting, grading, weighing and the purchase of butter, cheese, [244] and eggs. And again by circumventing and avoiding the standards, grades, weights and specifications to which purchases are subject by means of false and fictitious inspection, grading, and weighing and by the prevention of honest and accurate inspection, grading and weighing by said representatives."

And again the prosecutor stated (R. 790-791):

"If the Court please, in the view of the Government in this particular instance it does not make the slightest particle of difference whether the eggs that were ordered were A eggs or B eggs, or any other kind of eggs, or storage eggs, or fresh eggs. The indictment charges here a conspiracy to impede the Government, the Inspectors of the Government, in the grading, weighing and purchasing of eggs. Now, if it appears by the testimony of this witness that a fraud was practiced upon the Government inspectors in connection with the inspection of eggs, it is certainly relevant to this inquiry, and whether or not we can trace those

exact eggs so as to produce a purchase order for them, a delivery receipt for them, an invoice for them, is entirely beside the question. The fact is that Colonel Hand was there for the purpose of inspecting eggs, and a fraud was practiced upon him in that connection, and I think we are clearly entitled to show it."

An inference is sought to be created by the Government that the official inspection system of the Government was continuously defeated in connection with the War Shipping Administration sales in 1943 and 1944 (U. S. Br. 63, note 13). As we have already observed there was no official inspection required of sales to the War Shipping Administration until January 15, 1944 (R. 3555-3556). The alleged activities of Berman and Goddard in directing the delivery of non-inspected Government eggs to the steamship companies in April and May 1944 was in no way connected with any deception upon Government inspectors for the simple reason that there was no Government inspection required at the point of delivery. All inspections were made at the company plant and the Government regulations permitted the delivery of these inspected eggs as and for the grade and quality on the day of inspection within twenty-one days thereafter. Thus, not even a strained inference of a fraud upon the inspection system of the Government can be drawn by any evidence covering the period 1943 and 1944.

CONCLUSION.

The judgments below in respect of both petitioners should be reversed.

Respectfully submitted,

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